UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Melanie Davis, Plaintiff, v. Queen Nelly, LLC, Defendant.	Court File No. 16-cv-2553 (PJS/SER) **DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS**

INTRODUCTION

Melanie Davis's 12 page complaint made two factual allegations that define the scope of this lawsuit: (i) Queen Nelly's parking lot had only 1 accessible parking space, and (ii) the lot did not have a van parking space. Facing irrefutable evidence that those two facts were not true as of the date she commenced this lawsuit, Davis apparently wants to start a new lawsuit. Instead of trying to establish standing based on the allegations in her complaint, she responds to the motion to dismiss by alleging new and different violations of the ADA and the MHRA. And she claims a right to recover damages even though the complaint she served does not allege that she suffered any compensable harm.

But this lawsuit is defined by the pleadings. Davis's complaint does not establish she had standing as of the date she commenced this lawsuit and should be dismissed without prejudice in its entirety.

FACTS

Davis sued Queen Nelly on June 29. Dec. Michaud, ¶ 7. The complaint alleges only three relevant facts:

- Davis attempted to visit the Dairy Queen on April 27, 2016. Complaint, ¶ 10.
- The Dairy Queen parking lot had approximately 30 spaces, but only one accessible spot with an aisle. Complaint, ¶ 11.
- The parking lot had no van parking spaces. Complaint, ¶ 24(b).

Whether or not these barriers existed when Davis visited the Dairy Queen in April, a certified accessibility specialist report confirms they do not exist and have not existed since the parking lot was repainted in May – more than a month before this lawsuit was commenced. Dec. Quarve-Peterson. Davis does not challenge the specialist's findings, and does not dispute the fact that both of the barriers she based her lawsuit on are resolved.

Instead, Davis tries to change her lawsuit. In her opposition, Davis now alleges that the van parking sign is not the right height, and that the curb ramp is not compliant. She now also alleges her right to recover damages. But these new allegations are not found in her complaint.

I. DAVIS DOES NOT HAVE STANDING.

Davis does not have standing under state or federal law to seek prospective relief. Standing is determined as of the lawsuit's commencement.

Steger v. Franco, Inc., 228 F.3d 889, 892 (8th Cir. 2000). Davis bears the burden to establish her standing. *FW/PBS, Inc., v. City of Dallas*, 493 U.S.215, 231 (1990). And, because prospective relief under the ADA and the MHRA are coextensive, the same analysis applies. *Hillesheim v. Casey's Retail* Co., 2016 U.S. Dist. LEXIS 87686, *3 (D. Minn. July 6, 2016).

Queen Nelly made a factual challenge to Davis's allegations under Rule 12(b)(1). The purpose of a factual challenge is to determine whether the jurisdictional allegations made in a complaint are in fact true. *See, e.g. Osborn v. U.S.* 918 F.2d 724, 729 (8th Cir. 1990). And "because jurisdiction is a threshold question, judicial economy demands that the issue be decided at the outset rather than deferring it until trial." *Id.* Davis does not submit any evidence to prove that the barriers identified in her complaint were present when she sued Queen Nelly. She does not challenge the sufficiency or accuracy of Queen Nelly's evidence that the barriers she complains of do not exist. For that reason, the case should be dismissed in its entirety.

To escape dismissal, Davis offers the same arguments her attorney made – and lost – in *Disability Support Alliance v. Geller Family Ltd. P'ship III.* 2016 U.S. Dist. LEXIS 13419 (D. Minn. February 3, 2016). In that case, the plaintiff sued Geller for two ADA violations in the parking lot – an insufficient number of accessible parking spaces and an access aisle that was not level. Geller made a factual attack on a Rule 12(b)(1) motion to dismiss, submitting evidence that the two alleged barriers had been removed. In opposition, the plaintiff alleged eight new violations of the ADA.

The court in Geller held that the plaintiff did not meet her burden to establish standing, and limited its review to evidence of the violations alleged in the complaint: "In their Complaint, Smith and DSA identified two alleged violations of the ADA…Before Smith and DSA brought this action, Geller had renovated the Eagan Convenience Center's parking lot. The renovations redressed the ADA violations identified by Smith and DSA in their Complaint." *Id.* at *4.

The same holds true here. Queen Nelly repainted its parking lot on May 3. Davis did not commence this lawsuit until June 29, after the alleged barriers had been removed. The parking lot no longer suffers the defects Davis alleged existed on April 27, 2016. Davis's complaint does not satisfy her burden of showing that a barrier exists now, or that one existed on the day she commenced this lawsuit. She has not even attempted to refute the evidence that the two violations she alleged in her complaint did not exist when she started this lawsuit. She has not shown she has standing, so her claims should be dismissed.

II. DAVIS'S COMPLAINT NEED NOT BE REMANDED.

In opposition to this motion, Davis requests that this Court remand the case to state court for a trial on minimal damages under the Minnesota

Human Rights Act. But her complaint does not allege facts that would justify an award of damages. Davis's Complaint should be dismissed without prejudice in its entirety.

Federal Rule of Civil Procedure 8(a) requires a short and plain statement of the claim showing entitlement to relief and a demand for the relief sought. Davis's complaint alleges facts that, if true, would show an entitlement to prospective relief – elimination of the alleged barriers to access. She wants this case remanded to state court because her demand for relief sought actual damages. The problem is that her complaint did not allege facts that would show she is entitled to a damages award.

Davis's complaint states two causes of action; Violation of the ADA and violation of the MHRA. In both counts, Davis claims to suffer irreparable harm unless and until the alleged barriers are removed. Complaint, ¶¶ 33, 45. She makes no allegation of suffering any sort of compensable harm. Her prayer for relief requests an award of damages pursuant to Minn. Stat. §§ 363A.33 subd. 6 and 363A.29 subd. 4. Those statutes do allow for recovery of actual damages. However, if Davis is seeking an award of actual damages, she must at least plead that she suffered actual, compensable harm. See, e.g. *In re Northwest Airlines Privacy Litigation*, 2004 WL 1278459, *6 (D. Minn. June 6, 2004 ("Damages are an essential element of a breach of contract claim, and the failure to allege damages would be fatal to Plaintiffs' contract claims.") (internal citation omitted).Because Davis's complaint does not plead facts to support a claim for actual damages, there is nothing to remand.

CONCLUSION

Davis sued Queen Nelly for injunctive relief when there was nothing to enjoin. She is not permitted to change the entire nature of the case in opposition to a motion to dismiss by alleging wholly new violations of the ADA and MHRA and claiming an absolute right to nominal damages. This case should be dismissed without prejudice. This result will not bar Davis from recommencing a suit for damages for any alleged violations of the ADA and MHRA.

Dated: September 8, 2016

RUBRIC LEGAL LLC

/s/ Michael Frasier
Michael H. Frasier (#387704)
Chad A. Snyder (#288275)
233 Park Avenue S., Suite 205
Minneapolis, MN 55415
(612) 465-0074
Michael@RubricLegal.com
Chad@RubricLegal.com

Attorneys for Defendant